S.
JUL 27 1961
JAMES R. BROWNING, Clerk

No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1961

SAVERIO NASTA ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General,
ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

Cases:

Graver Tank & Mfg. Co., Inc. v. *Linde Air Products Co.*, 336 U.S. 271 — 4

Great Atlantic & Pacific Tea Co. v. *Supermarket Equipment Corp.*, 340 U.S. 147 — 4

Latus v. *United States*, 277 F. 2d 264, certiorari denied, 364 U.S. 827 — 5

Noel v. *Isbrandtsen*, 287 F. 2d 783, certiorari denied, June 19, 1961 — 5

The Germanic, 196 U.S. 589 — 4

United Pilots Association v. *Halecki*, 358 U.S. 613 — 6

West v. *United States*, 361 U.S. 118 — 4, 5, 6

Statute:

Suits in Admiralty Act, 46 U.S.C. 741, *et seq.* — 3

602343—61

QUESTION PRESENTED

Whether the courts below erred in finding that petitioners' injury was not occasioned by negligence on the part of the United States.

STATEMENT

The basic facts were found by the district court (181 F. Supp. 906, 906–910) and are not in dispute.

The S.S. *John Marshall* was a United States-owned Liberty vessel which in 1946 had been deactivated and placed in the "moth ball" fleet in the James River. The deactivation required heavy work, which included lowering the vessel's standing rigging into cradles, removing and stowing cargo blocks, draining boilers and pipes, rendering the main engine inoperative, and covering electrical equipment with preservatives. After its deactivation, the vessel was a "dead ship" incapable of navigation. 181 F. Supp. 906–907.

In April 1952, the *John Marshall* was transferred to the reserve (moth ball) fleet of the Hudson River. At that time 819 man-hours of labor were spent upon her in rust removal, sweeping, storage of tank tops, and other operations, but no metal preservatives of any kind were applied. None of the workers suffered any ill effects as a result of his presence on the vessel. 181 F. Supp. at 907.

On May 22, 1955, the vessel was towed to a drydock on Staten Island, where she was surveyed by a marine surveyor who found her holds exceptionally clean. From June 9 to June 24, 1955, a speed measuring device that extends through her hull was installed; this required burning and welding some of the metal portions of the vessel. None of the 20 or more work-

ers involved suffered any injury or discomfort from his work upon the ship. 181 F. Supp. at 907.

Constable Hook Shipyard, Inc., was the successful bidder on additional work to be performed upon the *John Marshall*. On June 27, 1955, the vessel was towed to the Constable Hook shipyard, where she was placed in the sole custody and control of Constable Hook. The work in the holds required burning and welding metal with acetylene torches, and "chipping" metal with a pneumatic hose. During the course of the work, the temperature was sometimes "well up in the 90's," and greyish powder or smoke was present in the holds. 181 F. Supp. at 907, 909.

As a result of these conditions the 10 petitioners, employees of Constable Hook, suffered a skin irritation. Apparently, similar irritation was not experienced by the remaining 15 or 20 employees aboard the vessel. The degree of skin irritation was minor for some of the petitioners, and substantial for others. The differences in severity were due to differing skin sensitivity. 181 F. Supp. at 908–910.

Petitioners brought this action under the Suits in Admiralty Act (46 U.S.C. 741, *et seq.*) against the United States, as owner of the *John Marshall,* for breach of the warranty of seaworthiness and for negligence in failing to provide a safe place to work. In the course of the trial, petitioners abandoned the unseaworthiness count and rested their case solely on negligence. The grey powder was never subjected to chemical or medical analysis, and no definite proof of the cause of the skin irritations was offered in evidence. 181 F. Supp. at 906, 910.

The district court expressed the opinion that petitioners' employer, Constable Hook shipyard, was "woefully negligent" in proceeding with the work after learning of petitioners' skin troubles, while failing to provide "blowers" which would carry away the abrasive ash and dust caused by the use of acetylene torches and pneumatic hose. The court, however, found that no latent defects or hidden dangers existed on the vessel when it was transferred to Constable Hook and that there had been no negligence on the part of the United States. It therefore dismissed the libel against the United States. 181 F. Supp. at 910.

The court of appeals, in an opinion by Judge Learned Hand, affirmed. The court noted that the situation in this case was similar to that in *West* v. *United States,* 361 U.S. 118, where the Court denied recovery against the United States. The court further held that there was an absence of proof as to what substance produced the skin irritations and concluded that petitioners (Pet. App. 12):

> * * * were under a greater burden than only to show that they were injured while at work aboard, and that is really all that they did show.

ARGUMENT

This Court does not "review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.,* 336 U.S. 271, 275; see, *e.g., Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.,* 340 U.S. 147; *The Germanic,* 196 U.S. 589. The courts below found that

the vessel contained no latent or hidden defects when transferred to the Constable Hook shipyard. Moreover, they found no basis in the record for a determination that the United States knew or should have known that a dangerous condition would arise in the careful performance of the work by the independent contractor. In short, the courts below found that there was no negligence on the part of the government; the only negligence was that of the contractor. These determinations are fully supported by the record.

The shipowner is not liable, in the absence of its own negligence or breach of the warranty of seaworthiness,[1] for injuries resulting from unsafe conditions caused by the work of an independent contractor making repairs upon the vessel. *West* v. *United States,* 361 U.S. 118, 122–123; *Noel* v. *Isbrandtsen,* 287 F. 2d 783 (C.A. 4), certiorari denied,

[1] Petitioners abandoned their claim for breach of the warranty of seaworthiness in both lower courts (181 F. Supp. 906; Pet. App. 11–12). In any event the warranty of seaworthiness has no application to the *John Marshall*, which was a dead ship of the moth ball fleet out of navigation undergoing repairs. *West* v. *United States*, 361 U.S. 118; *Latus* v. *United States*, 277 F. 2d 264 (C.A. 2), certiorari denied, 364 U.S. 827; *Noel* v. *Isbrandtsen*, 287 F. 2d 783 (C.A. 4), certiorari denied, June 19, 1961.

June 19, 1961.[1] Thus, the courts below were clearly correct in denying petitioners' claim and there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ALAN S. ROSENTHAL,
DAVID L. ROSE,
Attorneys.

JULY 1961.

---

[1] *United Pilots Association* v. *Halecki*, 358 U.S. 613, relied upon by petitioners (Pet. 7–8), is not in point. There the jury found in favor of the libellant, and this Court, while reversing on the ground that the doctrine of unseaworthiness did not apply, remanded for a new trial on the question of the shipowner's negligence. On remand, the Second Circuit concluded that the shipowner might have been negligent in directing the use of a dangerous gas (carbon tetrochloride) in confined quarters without adequate ventilation, distinguishing *West* on the ground that in *West* the shipowner did not direct the use of a dangerous method of accomplishing the work. 282 F. 2d 137. This case is like *West* (as the Second Circuit noted below) and unlike *Halecki*, because the government did not direct the use of a dangerous method.

U. S. GOVERNMENT PRINTING OFFICE: 1961